TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 149.

JAY DELAMATER, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

FILED NOVEMBER 13, 1905.

(19,963.)

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INDEX.

	Original.	Print.
Caption	1	1
Petition for writ of error to circuit court of Potter county	2	1
Allowance of writ of error to circuit court of Potter county	9	5
Writ of error to circuit court of Potter county	11	5
Citation on writ of error to circuit court of Potter county	14	6
Transcript from circuit court of Potter county	17	7
Writ of error	17	7
Clerk's certificate	19	8
Certificate of trial judge	20	9
Certificate of probable cause for writ of error	21	9
Bill of exceptions	23	10
Information	25	11
Demurrer	27	12
Statement of evidence	28	13
Motion for verdict for defendant	29	14
Verdict	30	14
Motion in arrest of judgment	30	15
Motion for new trial	32	15
Judgment and sentence	33	16
Assignment of errors	34	17

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	Original.	Print.
Stipulation as to bill of exceptions	36	18
Judge's certificate to bill of exceptions	37	19
Judgment and sentence	39	19
Motion for new trial	41	20
Motion in arrest of judgment	43	21
Demurrer to information	45	22
Minutes of trial	46	22
Stenographer's report of trial	49	24
Testimony of Jay Delamater	49	25
Motion for verdict for defendant	51	26
Stenographer's certificate	52	26
Information	53	27
Brief for plaintiff in error (omitted in printing)	58	—
Abstract of plaintiff in error (" ")	75	—
Citation	88	29
Brief of S. M. Howard for defendant in error (omitted in printing)	92	—
Brief of Hall & Lawrence for defendant in error (omitted in printing)	152	—
Argument and submission	222	30
Judgment	224	30
Opinion by Haney, J	226	31
Corson, J	237	36
Fuller, J	245	40
Clerk's certificate to opinions	247	41
Order allowing writ of error	249	42
Petition for writ of error	250	42
Assignment of errors	252	43
Writ of error	259	46
Citation	263	47
Bond on writ of error	267	48
Clerk's certificate to record	270	49
Stipulation to omit parts of record in printing	271	49

1 In the Supreme Court, State of South Dakota.

No. 2083.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

Be it remembered, that on the 8th day of April, A. D. 1904, that being a day of the regular April, 1904 term of said Court, there was filed in the above entitled cause, a petition for a writ of error, which said petition is in words and figures as follows, to-wit:

2 In the Supreme Court, State of South Dakota.

STATE OF SOUTH DAKOTA, Plaintiff and Defendant in Error,
vs.
JAY DALAMATER, Defendant and Plaintiff in Error.

Petition for Writ of Error to the Circuit Court of Potter County.

To the Supreme Court of the State of South Dakota:

J. Dalameter the defendant in the above entitled action having been convicted and sentenced in the Circuit Court of Potter County, South Dakota of the crime of soliciting orders for the sale of intoxicating liquors in lots of less than five (5) gallons without having paid a license therefor as required by Section 2834 Revised Political Code of South Dakota 1903 which provides as follows:

"In all townships precincts, town and cities of this State there shall be annually paid the following license upon the business of selling or keeping for sale by all persons whose business in whole or in part consists in selling or keeping for sale in this state, distilled, brewed or malt liquors or mixed liquors as follows: * * * upon the business of selling or offering for sale any of the above mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, two hundred dollars per annum. Said license to be paid in each county in which said traveling salesman does business in accordance with the provision of section 2836 * * * .

Respectfully applies to this court for a writ of error to the Circuit Court of Potter County South Dakota from the judgment of conviction and sentence rendered by said Circuit Court against him
3 and as and for the grounds of this petition respectfully shows to the court.

That at the regular March A. D. 1904 term of the Circuit Court in and for the County of Potter in the State of South Dakota an information was filed against this defendant charging * * * "That the said J. Dalameter on the 10th day of February A. D. 1904 at and within the County of Potter and State of South Dakota was then

and there a person whose business consisted in whole or in part in unlawfully selling or offering for sale spirituous, vinous, malt, brewed, fermented or other intoxicating liquors as a traveling salesman who then and there unlawfully solicited orders for such intoxicating liquors by the jug, bottle or vessel in lots of less than five gallons each, at one time and without having paid the license to said County of Potter or to the treasurer thereof as required by Section 2834 of the revised political code of the year 1903 of the state of South Dakota * * * . To which information this defendant demurred on the ground "That the facts stated in said information do not constitute a public offense," which demurrer was, by the Court, overruled and an exception was entered and settled for the defendant.

That this defendant thereupon entered his plea of not guilty to the crime charged in the information.

That said action was brought on for trial to the court an- a jury, that the following testimony was introduced:

"That the defendant, J. Dalameter is now and was on the 10th of February A. D. 1904, a traveling salesman employed by Lewis L. Metzger & Co. and that the said Lewis L. Metzger & Co. are residents of the City of St. Paul in the State of Minnesota and that the said Lewis L. Metzger & Co. have their place of business at the said City of St. Paul and have no place of business in the State of South Dakota and have had no such place of business in said State

4 of South Dakota.

That on the 10th of February A. D. 1904 J. Dalameter as such employee was engaged as said traveling salesman in soliciting proposals or orders for the said Lewis L. Metzger & Co. for the sale of intoxicating liquors in quantities less than five gallons from citizens and residents of and within the County of Potter and State of South Dakota who were not merchants, traders or dealers in intoxicating liquors, that on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Cross who were not merchants, traders or dealers in intoxicating liquors at and in the County of Potter and State of South Dakota soliciting or requesting proposals or orders from said last named persons for the sale to them by Lewis L. Metzger & Co. of said intoxicating liquors.

That the said proposals and orders were procured by the defendant from said named persons forwarded to his principal the said Lewis L. Metzger & Co. in the City of St. Paul and State of Minnesota. At said time no money was paid by either of the said persons to the said defendant or to said Lewis L. Metzger & Co. and said proposals or orders were forwarded with the understanding that they were subject to the approval of said Lewis L. Metzger & Co. and that the defendant had no power or authority to approve said proposals or orders nor to receive any money thereon. In addition to being subject to the approval of said Lewis L. Metzger & Co. said proposals or orders were conditioned that the said whiskey so ordered should be delivered to the said Ferdinand Renner and Paul Gross hereinbefore named, f. o. b. cars at the city of St. Paul and State of Minnesota. That the said Ferdinand Renner and Paul Gross hereinbefore named were to

pay the *greight* from the City of St. Paul and State of Minnesota and were to make remittance of the purchase price of said goods to said Lewis L. Metzger & Co. at the City of St. Paul in the State of Minnesota within sixty (60) days after the receipt of said liquor in said County of Potter. That this defendant has never paid any license to the County of Potter or State of South Dakota or to the
5 treasurer or to anyone as required by Section 2834 of the Revised political code of the year 1903 of the state of South Dakota and that the said defendant had not then and there and has never paid any license or fee whatsoever to any township, precinct, town or city within the said County or State and that the said liquor therein sold was intoxicating liquor to wit: whiskey and was not a proprietary patent medicine and that the said defendant is not now and never has been a licensed pharmacist under the laws of the State of South Dakota."

The taking of testimony having concluded and both sides having rested the said case the following motion requesting the court to advise the jury to return a verdict for the defendant was interposed by the defendant:

"At this time the defendant asks the Court to advise the jury to return a verdict for the defendant upon all of the issues for the reason that it affirmatively appears from the evidence and the undisputed evidence of the State that no offense has been committed, that it affirmatively appears that no sale was made within the State of South Dakota and for the further reason that the statute under which the prosecution is brought is unconstitutional and void in that it is in conflict with Section 8 of Article one (1) of the Constitution of the United States which places in Congress the sole and exclusive right and authority to regulate and control inter-state commerce. It affirmatively appears in this case from the uncontradicted testimony that this was and is a transaction involving and being inter-state commerce business being a sale made in the State of Minnesota on proposals or orders received in the State of South Dakota subject to the approval of the principal in the State of Minnesota that the goods were to be delivered to the parties who were named as purchasers in the State of Minnesota, the freight to be paid from the City of St.
Paul in the State of Minnesota by said purchasers, that the
6 said act under which said prosecution is drawn is unconstitutional and void being in direct conflict with the powers of the Congress of the United States and of article 1, of section 8 of the Federal Constitution."

Said motion was, by the Court, denied and an exception to such ruling allowed and settled for the defendant.

The jury after retiring to consider of their verdict returned a verdict finding the defendant "guilty as charged in the information." to which verdict the defendant was allowed an exception which was duly entered and settled for.

The defendant being called for sentence interposed a motion in arrest of judgment setting forth:

"1. That the facts stated in the information filed against this defendant in this action do not constitute a public offense.

2. That the act or law under which the information in this action is drawn is unconstitutional and void, said act being in conflict with Article 1, Section 8 of the Constitution of the United States, the said law being an attempt by the legislature of the State of South Dakota to hamper, interfere with and restrict inter-state commerce."

Which said motion was by the Court, on each and every ground duly overruled and an exception allowed and settled for the defendant

That a Bill of Exceptions was settled by the Court and filed with Clerk of said Circuit Court on March 31st 1904.

Thereupon the defendant interposed a motion for a new trial, which was, by the Court, duly overruled and an exception allowed and settled for the defendant.

Thereafter this defendant was, by the Court, sentenced to pay a fine of two hundred and fifty dollars ($250.00) and stand committed to the County Jail of Potter County South Dakota until such fine is paid.

Thereafter a certificate of probable cause for a writ of error was granted by the judge of the trial court.

7 This defendant says that there is manifest error on the face of the record by which his substantial rights have been prejudiced. That the statute under which this defendant was informed against, tried, convicted and sentenced, is unconstitutional and void being in conflict with the provision of Article 1, Section 8, Constitution of the United States, which provides "The Congress shall have power; * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes * * * ."

Wherefore:—This defendant prays the Court that a writ of error issue to the Circuit Court of Potter County South Dakota commanding the Clerk of the said Court to forthwith transmit the record in this action to this Court. That the judgment and sentence of said circuit Court may be set aside and this defendant be discharged.

Respectfully submitted.

LEE STOVER,
Attorney for the Defendant.

Watertown, So. Dakota.

8 STATE OF SOUTH DAKOTA, *County of Codington, ss:*

Jay Delameter being duly sworn upon his oath deposes and says that he is the identical person who was the defendant in the case of State of South Dakota *vs.* Jay Delameter, tried in the Circuit Court of Potter County, South Dakota, at the March A. D. 1904 term thereof; that this affiant has read the above and foregoing petition to the Supreme Court of South Dakota for a writ of error to the Circuit Court of Potter County, South Dakota, in said action and knows the contents thereof; that the same is true of his own knowledge; that

this application is not made for the purpose of delay but that justice may be done.

JAY DELAMATER.

Subscribed and sworn to before me this first day of April, 1904.
[SEAL.] LEE STOVER,
Notary Public, South Dakota.

9 [Endorsed:] In the Supreme Court, State of South Dakota. State of South Dakota, Plaintiff and defendant in error, *vs.* Jay Delamater, Defendant and plaintiff in error. Petition for a writ of error to the Circuit court of Potter County. Lee Stover, Watertown, S. D. Attorney for defendant.

[Endorsed:] 2083. Let this writ issue as prayed for and be made returnable to this court at 10 o'clock A. M. on the 12th day of May, A. D. 1904. H. G. Fuller, Judge. Supreme Court State of South Dakota, Filed Ap'r 8 1904. Frank Crane, Clerk.

10 And afterwards, to-wit, on the same day, there was issued in said case, a writ of error, which said writ of error is in words and figures the following, to-wit:

11 *Writ of Error.*

STATE OF SOUTH DAKOTA:

In Supreme Court.

To the Honorable the Circuit Court within and for the County of Potter in the Sixth Judicial Circuit of the State of South Dakota, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment upon the information for selling intoxicating liquors without a license which is in the said Circuit Court before you, wherein Jay Dalamater is convicted of selling liquor without a license, which information is in behalf of the State of South Dakota, and against the said Jay Delamater manifest error hath happened to the great damage of the said Jay Dalamater as by his petition appears.

We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given; That then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the State of South Dakota, together with this writ, so that you may have the same at Pierre, in said State, at the April Term of said Supreme Court, on, to-wit: the twelfth day of May A. D. 1904, and at ten o'clock in the forenoon of said day, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may

cause further to be done therein to correct such error what of right and accordingly to the laws and customs of the State of South Dakota, should be done.

Witness, the Honorable Dighton Corson, Presiding Judge of the said Supreme Court, this eighth day of April in the year of our Lord One Thousand Nine Hundred and four.

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota.
[SEAL.] By C. LOUIS ALLEN,
Deputy Clerk.

12 [Endorsed:] State of South Dakota. In Supreme Court. Writ of error. Filed in the office of the Clerk of the Circuit Court, in and for Potter County, South Dakota, this 13 day of April A. D. 1904 at 9:30 A. M. Harry Bolinger, Clerk.

13 And afterwards, to-wit, on the same day, there was issued in said case, a citation, which said citation is in words and figures the following, to-wit:

14 *Citation.*

STATE OF SOUTH DAKOTA:

In Supreme Court.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DALAMATER, Plaintiff in Error.

Citation.

STATE OF SOUTH DAKOTA, *ss:*

To the Attorney General, and to the State's Attorney for Potter County, State of South Dakota, and said Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the State of South Dakota, to be holden at the city of Pierre in said State, at the April Term of said Supreme Court, to be holden on the twelfth day of May, A. D. 1904, at ten o'clock A. M. of that day, pursuant to Writ of Error now issued from the said Supreme Court, wherein Jay Dalamater is Plaintiff in Error, and State of South Dakota is Defendant in Error, to show cause if any there be, why the judgment of conviction of Jay Dalamater in the said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Dighton Corson, Presiding Judge of the

said Supreme Court, this eighth day of April in the year of our Lord One Thousand Nine Hundred and four.

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota,
[SEAL.] By C. LOUIS ALLEN,
Deputy Clerk.

15 [Endorsed:] 2083. State of South Dakota. In Supreme Court. State of South Dakota, Defendant in Error, *vs.* Jay Dalamater, Plaintiff in Error. Citation in State Criminal Cases. Due and person- service of the within citation by the delivery of a true copy to me at my office is admitted this 13 day of April, A. D. 1904. Philo Hall, Attorney General, State of South Dakota. S. M. Howard, State's Attorney, Potter County, South Dakota. 2083. Supreme Court, State of South Dakota. Filed May 7, 1904. Frank Crane, Clerk.

16 And afterwards, to-wit, on the 21st day of April, A. D. 1904, there was filed in said case, the record from the lower court, which said record is in words and figures the following, to-wit:

17 *Writ of Error.*

STATE OF SOUTH DAKOTA:

In Supreme Court.

To the Honorable the Circuit Court within and for the County of Potter in the Sixth Judicial Circuit of the State of South Dakota, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment upon the information for selling intoxicating liquors without a license which is in the said Circuit Court before you, wherein Jay Delamater is convicted of selling liquor without a license, which information is in behalf of the State of South Dakota, and against the said Jay Dalamater manifest error hath happened to the great damage of the said Jay Dalamater as by his petition appears.

We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given; That then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the State of South Dakota, together with this writ, so that you may have the same at Pierre, in said State, at the April term of the said Supreme Court, on, to-wit: the twelfth day of May A. D. 1904, and at ten o'clock in the forenoon of said day, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct such error what of right

and accordingly to the laws and customs of the State of South Dakota, should be done.

Witness, the Honorable Dighton Corson, Presiding Judge of the said Supreme Court, this eighth day of April in the year of our Lord One Thousand Nine Hundred and four.

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota,
[SEAL.] By C. LOUIS ALLEN,
Deputy Clerk.

18 [Endorsed:] State of South Dakota. In Supreme Court. Writ of Error. Filed in the office of the Clerk of the Circuit Court, in and for Potter County, South Dakota, this 13 day of April A. D. 1904, at 9:30 A. M. Harry Bolinger Clerk.

19 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In the Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DALAMETER, Defendant.

Clerk's Certificate.

I, Harry Bolinger, Clerk of the Circuit Court within and for said County of Potter in the Sixth Judicial Circuit of the State of South Dakota, do hereby certify and return in obedience to the annexed writ of error that the hereunto attached and foregoing is the full and complete record of this action; to wit. The information, the demurrer to the information, the minutes of the defendant's plea, the trial, all bills of exception including the assignments of error and prayer for reversal, the defendant's motion in arrest of judgment, the defendant's motion for new trial, the sentence and judgment of the Court, the trial judge's certificate for probable cause for writ of error, the statutory certificate of the Judge, the writ of error issued on the 8th day of April A. D. 1904 in the case of the State of South Dakota; plaintiff and defendant in error *vs.* Jay Delamater, defendant and plaintiff in error as the same now remain on record in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 18th day of April A. D. 1904.

[SEAL.] HARRY BOLINGER,
Clerk of the Circuit Court, Potter County, South Dakota.

20 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Certificate by Trial Judge.

The above named defendant having served a writ of error from the Supreme Court of the State of South Dakota and the record in said cause being required by said Supreme Court, the undersigned, the Judge of said Circuit Court presiding at the said trial of said cause does hereby certify that the record attached hereto contains in itself all the bills of exceptions and a true copy of all of the evidence bearing upon or necessarily relating to the bill of exceptions and a true record of all the proceedings had bearing upon and necessarily relating to the bill of exceptions and a complete record of all the proceedings had in said cause.

Dated at Pierre, South Dakota, this 4. day of April A. D. 1904.

[SEAL.] LORING E. GAFFY,
Judge of the Circuit Court, Sixth Judicial Circuit.

Filed in the Office of the Clerk of the Circuit Court, in and for Potter County, South Dakota, this 6 day of April A. D. 1904 at 10 A. M.

HARRY BOLINGER, *Clerk.*

21 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In the Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DALAMATER, Defendant.

Certificate of Probable Cause for a Writ of Error.

On this 31st day of March, A. D., 1904, this matter coming on before the court at and during the regular March A. D. 1904, term of this court in and for the County of Potter in the State of South Dakota on the application of the defendant, Jay Dalamater, who stands convicted before this court of the Crime of soliciting orders for the sale of intoxicating liquors in quantitites less than five gallons without having first obtained a license so to do as required by Section 2834 of the Compl*i*ed Laws of the State of South Dakota, for a Certificate of Probable Cause for a writ of error in said action and the Court being fully advised in the premises it is hereby ordered, That probable cause for the writ exists and this certificate is accordingly

made and further execution under the judgment in said action heretofore rendered is suspended as provided by law.

Done by the Court, in open Court, this 31st day of March, A. D., 1904.

By the Court,

LORING E. GAFFY, *Judge.*

Pending the appeal in above cause, defendant is allowed to go under bail fixed at the sum of $500.00 cash, to be deposited with the Clerk of this Court.

LORING E. GAFFY, *Judge.*

22 [Endorsed:] Due service of within by copy is admitted this 31st day of March A. D. 1904. S. R. Henely, Sheriff of Potter county, South Dakota. Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota this 31 day of March A. D. 1904 at 10 o'clock A. M. —— ——, Clerk

23 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Bill of Exceptions.

24 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

At the regular March term A. D., 1904 *term* of said Court. Before Loring E. Gaffy, presiding Judge.

Present: S. M. Howard, State's Attorney, Attorney for Plaintiff. Lee Stover and A. J. Brower, Attorneys for Defendant. All officers of said Court.

MARCH 29TH, 1904.

The following information was filed against the defendant Jay Delamater by S. M. Howard, State's Attorney, of Potter County, South Dakota.

25 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court of Sixth Circuit, March Term, A. D. 1904.

THE STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

I, Samuel M. Howard, the undersigned State's Attorney, in and for said County and state, in the name and by the authority of the State of South Dakota, hereby inform the court and give the court to understand, that said Jay Delamater on the 10th day of February, A. D., One Thousand Nine Hundred and Four, at and within the County of Potter and State of South Dakota, was then and there a person whose business consisted, in whole or in part in unlawfully selling, or offering for sale spirituous, vinous, malt, brewed, fermented, or other intoxicating liquors as a traveling salesman who then and there unlawfully solicited orders for such intoxicating liquors by the jug, bottle or other vessel in lots of less quantity than five gallons each at one time, and without having first paid the license to said county of Potter or to the Treasurer thereof as required by Sec. 2834 of the Revised Political Code of the year 1903 of the state of South Dakota; the said Jay Delamater not then and there having paid any license to any township, precinct town or city within said county of Potter; and said liquors not being proprietary patent medicines, and the said Jay Delamater not then and there being a licensed pharmacist, against the form of the statute in such case made and provided, and against the peace and dignity of the state of South Dakota, and prays that the said Jay Delamater may be arrested and dealt with according to law.

SAMUEL M. HOWARD,
State's Attorney in and for the County of Potter, State of South Dakota.

Subscribed and sworn to before me this 29th day of March, A. D., 1904.

[SEAL.] HARRY BOLINGER,
Clerk of Court.

26 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

Samuel M. Howard, being first duly sworn, deposes and says; that he is the State's Attorney in and for Potter County, S. D., that he has read the foregoing information and knows the contents thereof and that the same is true, according to his best information and belief.

SAMUEL M. HOWARD.

Subscribed and sworn to before me this 29th day of March, A. D. 1904.

HARRY BOLINGER,
[SEAL.] *Clerk of Court.*

Witnesses in the within entitled action whose names are known to the State's Attorney:—Ferdinand Renner, Paul Gross, William H. Clark.

(Indorsed on Back of Paper.)

Information No. —, March Term, A. D. 1904.

STATE OF SOUTH DAKOTA, *Sixth Judicial Circuit:*

In the Circuit Court within and for the County of Potter.

STATE OF SOUTH DAKOTA
vs.
JAY DELAMATER.

Information for selling or offering for sale intoxicating liquors in less quantities than five gallons each, without a license therefore.

Presented in open court by the State's Attorney in and for Potter County, state of South Dakota, and filed as a record of the Court, this 29th, day of March, 1904.

HARRY B-LINGER, *Clerk.*
SAMUEL M. HOWARD,
State's Attorney.

27 Whereupon the defendant, Jay Delamater at said time and place appeared in person and represented by Counsel waived the reading of the information, waived time in which to plead and subject to the right to withdraw his plea if he later so desired, duly entered his plea of "Not Guilty" to the offence charged in the information.

MARCH 30TH, 1904.

On the application of the defendant made in open Court Leave was granted by the Court to the defendant to withdraw his plea of not guilty and to file a demurrer.

Whereupon the defendant filed the following demurrer.

STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In the Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Demurrer.

Comes now the defendant in the above entitled action and demurrers to the information filed therein by the State's Attorney, against the defendant on the 29th day of March, A. D., 1904, and as and for the ground of said demurrer assigns.

That the facts stated in said information do not constitute a public offence.

LEE STOVER,
Attorney for Defendant.

Which demurrer after argument was by the Court duly overruled and an exception to said ruling allowed to and entered for the defendant.

Whereupon the defendant in person then entered of record his plea of not Guilty to the offense charged in the information.

Whereupon the above entitled action was brought on for trial to the court and jury.

28 A jury was duly called empannelled and sworn to try the case and the following testimony was introduced.

"That the defendant, Jay Delamater, is now and was on the 10th day of February, A. D., 1904, a travelling salesman employed by Lewis L. Metzger & Co., and that the said Lewis L. Metzger & Co., are residents of the city of St. Paul, in the state of Minnesota, and that said Lewis L. Metzger and Company have their place of business at the said City of St. Paul and have no place of business in the state of South Dakota, and have had no such place of business in the said state of South Dakota. That on the 10th day of February, A. D., 1904, Jay Delamater as such employee was engaged as said travelling salesman in soliciting proposals or orders for said Lewis L. Metzger & Co. for the sale of intoxicating liquors in quantities less than five gallons from citizens and residents of and within the County of Potter and State of South Dakota who were not merchants, traders or dealers in intoxicating liquors; That on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Gross who were not merchants, traders or dealers in intoxicating liquors, at and in the County of Potter and state of South Dakota, soliciting or requesting proposals or orders from said last named persons for the sale to them by Lewis L. Metzger & Co. of said intoxicating liquors. That the said proposals and orders were procured for defendant from said named persons, forwarded to his principal, the said Lewis L. Metzger & Co. in the City of St. Paul, state of Minnesota. At said time no money was paid by either of the said persons to the said defendant or to said Lewis L. Metzger & Co. and said proposals or orders were forwarded with the understanding that they were subject to the approval of the said Lewis L. Metzger & Co. and that the defendant had no power or authority to approve said proposals or order- nor to receive any money thereon. In addition to being subject to the approval of said Lewis L. Metzger & Co. said proposals or orders were conditioned that the said whiskey so ordered should be delivered to the said Ferdinand Renner and Paul Gross hereinbefore named, f. o. b. cars at the city of St. Paul in the state of Minnesota. That the said Ferdinand Renner and Paul Gross hereinbefore named were to pay the freight from the city of
29 St. Paul in the state of Minnesota and were to make remittance of the purchase price of said goods to said Lewis L.

Metzger & Co. at the city of St. Paul in the state of Minnesota within sixty days after receipt of said liquor in said County of Potter. That this defendant has never paid any license to the County of Potter or State of South Dakota or to the treasurer or to anyone as required by Section 2834 of the Revised Political Code of the year 1903 of the State of South Dakota, and that the said defendant had not then and there and has never paid any license or fee whatsoever to any township, precinct, town or city within the said county or state and that said liquor therein sold was intoxicating liquor, to-wit: whiskey, and was not a proprietary patent medicine and that the said defendant is not now and never has been a licensed pahrmacist under the laws of the state of South Dakota."

The taking of testimony having been concluded both sides having rested their case the following motion was interposed by the defendant "By Mr. Stover. At this time the defendant asks the Court to advise the jury to return a verdict for the defendant upon all the issues, for the reason that it affirmatively appears from the evidence and the uncontradicted evidence of the state that no offense has been committed; that it affirmatively appears that no sale was made within the state of South Dakota and for the further reason that the statute under which the prosecution is brought is unconstitutional and void, in that it is in conflict with Section 8 of Article 1 of the Constitution of the United States, which places in congress the sole and exclusive right and authority to regulate and control interstate commerce. It affirmatively appears in this case from the uncontradicted testimony that that was and is a transaction involving and being Interstate Commerce business, being a sale made in the state of Minnesota on proposals or orders received in the state of South Dakota subject to the approval of the principal in the State of Minnesota; that the goods were to be delivered to the parties who are named as purchasers in the state of Minnesota, the freight to be paid from the City of St. Paul in the state of Minnesota by said purchasers; that the said act under which said prosecution is drawn in unconstitutional and void, being in direct conflict with the powers of the Congress of the United States, and of Section 8 of Article 1 of the Federal Constitution.

Which said motion of the defendant was by the Court after argument duly overruled and an exception allowed to and entered of record for the defendant.

Thereupon the court instructed the jury and after retiring for deliberation the jury duly returned into Court and rendered the following verdict.

"We, the jury find the defendant guilty as charged in the information."

Which said verdict was duly entered of record and an exception for the defendant to the said verdict was allowed by the Court and duly entered of record for the said defendant.

The court fixed on March 31st, A. D., 1904 at 9 o'clock A. M. at the opening of Court as the time and place where the judgment of the Court would be pronounced against the defendant.

On March 31st at 9 A. M. on the opening of Court the defendant appearing in person and by counsel the following motion in arrest of judgment was interposed by the defendant.

STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Defendant's Motion in Arrest of Judgment.

Comes now the defendant, Jay Delamater, and moves the Court that no judgment be rendered against him on the verdict of guilty, as returned by the jury in this Court and as and for the grounds of said motion assigns.

1. That the facts stated in the information filed against this defendant in this action do not constitute a public offence.
2. That the act or law under which the information in this action is drawn is unconstitutional and void, said act being in con-
31 flict with Article 1, Section 8, of the Constitution of the United States, the said law being an attempt by the Legislature of the state of South Dakota to hamper, interfere with and restrict Interstate Commerce.

Respectfully submitted.

LEE STOVER,
Attorney for the Defendant.

Which said motion in arrest of Judgment was by the Court on each and every ground duly overruled and denied and an exception to the ruling of the Court on the said motion in arrest of judgment was allowed to and entered of record for the Defendant.

Whereupon the defendant duly presented and filed his following motion for a new trial in said action.

32 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Motion for a New Trial.

Now comes the above named defendant, Jay Dalamater, and shows to the Court that his substantial rights *has* been prejudiced and because thereof moves the Court for a new trial in the above entitled

action and as and for the grounds of said motion assigns the following error- committed by this Court on the trial of said action.

I.

That the Court erred in overruling the defendant's demurrer to the information filed against him in this action.

II.

That the Court erred in denying the motion made by this defendant, at the close of the testimony, to advise the jury to return a verdict for this defendant.

III.

That the Court erred in denying this defendant's motion made in arrest of judgment after the jury returned a verdict finding this defendant guilty as charged in the information.

IV.

That the law under which the information in this case was filed and on which this defendant was tried and found guilty by the jury is unconstitutional and void, because said law is in conflict with Article 1, Section 8 of the Constitution of the United States, said law being an attempt by the legislature of the State of South Dakota to regulate, restrain and interfere with interstate commerce.

Respectfully submitted, LEE STOVER,
Attorney for the Defendant.

33 Which said motion for a new trial after argument by counsel was by the Court on each and every ground duly overruled and denied and to the said ruling denying the defendant's motion for a new trial and to the adverse rule denying each and every ground of said motion for a new trial, an exception was allowed to and entered of record for the defendant. Whereupon the following sentence and judgment was pronounced by the Court.

STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

Present: Hon. Loring E. Gaffy, Judge of said Court and the officers of the said Court:

THE STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Convicted of the Crime of Selling or Offering for Sale Intoxicating Liquors in Less Quantities Than Five Gallons Each Without a License Therefor.

Now on this 31st day of March, A. D., 1904, the State's Attorney and the defendant, Jay Delamater, being in Court and this being the day fixed by the Court for the pronouncing of judgment upon conviction of the defendant for the crime of "selling or offering for sale intoxicating liquors in less quantities than five gallons each, without a license therefor" as charged in the information on file against this defendant in this Court and the defendant being informed by the Court of the nature of the information, of his plea of not guilty and of the verdict and being asked whether he had any legal cause to show why judgment should not be pronounced against him and no cause being shown the Court does Adjudge and the sentence is, That you, Jay Delamater, pay a fine of Two Hundred and fifty Dollars, ($250.00). And in default of said fine that you be imprisoned in the County jail of Potter County, South Dakota for the period of 125 days, being one day for every two dollars of said fine or until said fine shall be paid and that you stand committed until this sentence be complied with.

By the Court,

LORING E. GAFFY, *Judge.*

Attest:
HARRY BOLINGER,
[SEAL.] *Clerk of Circuit Court, Potter County, S. D.*

Defendant has an exception to the sentence and judgment.

34 *Assignments of Error.*

The defendant, Jay Delamater, assigns the following as errors occurring at the trial of said cause, that said assignments are agreed to, and are settled and allowed by the Court.

I.

That the trial Court erred in overruling the defendant's demurrer to the information filed against him in this action.

II.

That the trial court erred in overruling and denying the defendant's motion to direct the jury to return a verdict for the defendant being the motion made by the defendant at the conclusion of the testimony.

III.

That the verdict returned by the jury in said cause is contrary to law in particular for that the undisputed evidence and all of the evidence disclosed the transaction was one involving Interstate Commerce, and was outside and beyond the jurisdiction of the law of the State of South Dakota, and that the law under which the information was drawn and the verdict found is unconstitutional and void, being in conflict with Article 1 Section 8 of the Constitution of the United States.

IV.

That the trial Court erred in overruling the defendant's motion made in arrest of judgment.

V.

That the trial Court erred in overruling the defendant's motion for a new trial made prior to the entry of sentence and judgment against him.

VI.

That the trial Court erred in pronouncing judgment and sentence against the defendant, for that the law of the state of South Dakota under which the information was filed verdict returned and sentence pronounced is unconstitutional and void being in conflict with Article 1, Section 8 of the Constitution of the United States.

35 Wherefore defendant prays that the judgment of the trial Court may be reversed and that the defendant be discharged or the sentence be modified and that the Supreme Court may make such further order and disposition of said cause as the circumstances of the case may require.

LEE STOVER,
Attorney for the Defendant.

36 It is hereby stipulated that the above and foregoing consisting of thirteen sheets of typewritten matter may be settled and allowed as a bill of exceptions in the case of State of South Dakota, plaintiff *vs.* Jay Delamater, Defendant, and said bill of exceptions may be settled and signed by the Hon. Loring E. Gaffy, presiding Judge, without further notice and that each of the parties agree to the same as the Bill of Exceptions in the said action.

S. M. HOWADR,
State's Attorney, Potter County, South Dakota, Attorney for the Plaintiff.
LEE STOVER,
Attorney for Defendant.

37 *Certificate by the Court.*

Upon a full and careful examination of the foregoing exceptions and finding the same correct I hereby certify the same to be correct and to contain the information, the demurrer by the defendant, the plea of the defendant, all of the evidence which was given upon the trial, all of the objections by counsel, all of the rulings of the Court thereon, the exceptions taken by the defendant, the verdict of the Jury, the motion of the defendant in arrest of judgment, the motion of the defendant for a new trial, the sentence and judgment of the Court, and the assignments of errors by the defendant.

Done by the Court, in open Court at Gettysburg, S. D., this 31st day of March, A. D., 1904.

By the Court.

LORING E. GAFFY, *Judge.*

38 [Endorsed] State of South Dakota County of Potter. Circuit Court Sixth Circuit. State *v.* Dalamater. Bill of Exceptions. Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota, this 31 day of March, A. D. 1904 at 10 A. M. —— ——, Clerk.

39 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

THE STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Present: Hon. Loring E. Gaffy, Judge of said Court and the officers of the said Court:

Convicted of the Crime of Selling or Offering for Sale Intoxicating Liquors in Less Quantities Than Five Gallons Each Without a License Therefore.

Now, on this 31st day of March, A. D., 1904, the State's Attorney and the defendant, Jay Delamater, being in Court and this being the day fixed by the Court for the pronouncing of judgment upon conviction of the Defendant for the crime of "selling or offering for sale intoxicating liquors in less quantities than five gallons each without a license therefor" as charged in the information on file against this Defendant in this Court, and the Defendant being informed by the Court of the nature of the information, of his plea of not guilty and of the verdict and being asked whether he had any legal cause to show why judgment could not be pronounced against him, and no cause being shown, the Court does Adjudge and the sentence is, That you, Jay Delamater, pay a fine of Two Hundred fifty Dollars,

($250.00); and in default of said fine that you be imprisoned in the County jail of Potter County, South Dakota for the period of 125 days, being one day for every two dollars of said fine or until said fine shall be paid and that you stand committed until this sentence be complied with.

By the Court,

LORING E. GAFFY, *Judge.*

Attest:

[SEAL.] HARRY BOLINGER, *Clerk.*

40 [Endorsed:] Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota, this 31 day of March A. D. 1904 at 9:30 A. M. —— ——, Clerk. Recorded in Judgment Book on page 431. Fee 75 cts.

41 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,

vs.

JAY DELAMATER, Defendant.

Motion for a New Trial.

Now comes the above named defendant, Jay Delamater, and shows to the Court that his substantial rights *has* been prejudiced and because thereof moves the Court for a new trial in the above entitled action and as and for the ground of said motion assigns the following error committed by this Court on the trial of said action.

I.

That the Court erred in overrul*l*ing the defendant's demurrer to the information filed against him in this action.

II.

That the Court erred in denying the motion made by this defendant, at the close of the testimony, to advise the jury to return a verdict for this defendant.

III.

That the Court erred in denying this defendant's motion made in arrest of judgment after the jury returned a verdict finding this defendant guilty as charged in the information.

IV.

That the law under which the information in this case was filed and on which this defendant was tried and found guilty by the jury

is unconstitutional and void, because said law is in conflict with Article 1, Section 8 of the Constitution of the United States, said law being an attempt by the legislature of the State of South Dakota to regulate, restrain and interfere with Interstate Commerce.

Respectfully submitted,

LEE STOVER,
Attorney for the Defendant.

Upon presentation of the foregoing motion in open court, the same, is in all things overrul/ed and the defendant has an exception.

March 31st, 1904.

By the Court,

LORING E. GAFFY, *Judge.*

42 [Endorsed:] Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota, this 31 day of March, A. D. 1904 9:00 A. M. Harry Bolinger, Clerk.

43 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DALAMATER, Defendant.

Defendant's Motion in Arrest of Judgment.

Comes now the defendant, Jay Dalamater, and moves the Court that no judgment be rendered against him on the verdict of guilty, as returned by the Jury in this Court and as and for the grounds of said motion assigns.

1. That the facts stated in the information filed against this defendant in this action do not constitute a public offence.

2. That the act or law under which the information in this action is drawn is unconstitutional and void, said act being in Conflict with Article 1, Section 8, of the Constitution of the United States, the said law being an attempt by the Legislature of the state of South Dakota to hamper, interfere with and restrict interstate Commerce.

Respectfully submitted,

LEE STOVER,
Attorney for the Defendant.

Upon presentation of the foregoing Motion in open Court, the same is in all things overruled and the defendant has an exception.

March 31st, 1904.

By the Court,

LORING E. GAFFY, *Judge.*

44 [Endorsed:] Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota this 31 day of Mar. A. D. 1904, 9:30 A. M. Harry Bolinger, Clerk.

45 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DALAMATER, Defendant.

Demurrer.

Comes now the defendant in the above entitled action and demurrs to the information filed herein by the State's Attorney, against this defendant on the 29th day of March, A. D., 1904, and as and for the ground of said demur- assigns.

That the facts stated in said information do not constitute a public offence.

LEE STOVER,
Attorney for Defendant.

Filed in the Office of the Clerk of the Circuit Court in and for Potter County; South Dakota, this 30 day of March A. D. 1904 at 9 A. M.

HARRY BOLINGER, *Clerk.*

[Endorsed:] Demurrer.

46 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Minutes of the Journal.

A regular term of the Circuit Court of the Sixth Judicial Circuit in and for the County of Potter, State of South Dakota.

Regular March A. D. 1904 term of said Court.

Loring E. Gaffey, Presiding Judge.

Present: All the officers of the Court.

S. M. Howard, State's Attorney of Potter County, Attorney for Plaintiff.

Lee Stover, Attorney for the Defendant.

MARCH 29, 1904.

Information filed by S. M. Howard, State's Attorney of Potter County, S. D., against Jay Delamater charging said Jay Delamater with "Selling or offering for sale intoxicating liquors in less quantities than five gallons each without a license therefor."

Defendant, Jay Delamater, appears in person and by Lee Stover, his attorney, waived the reading of the information, waived time in which to plead and subject to the right to withdraw his plea if he later so desired, duly entered his plea of "not guilty" to the offense charged in the information.

MARCH 30, 1904.

On application of the defendant — the case of the State of South Dakota *vs.* Jay Delamater, Defendant, made in open court, leave was granted by the Court to the defendant to withdraw his
47 plea of "not guilty" and to file a demurrer.

Demurrer filed by the defendant.

After argument the demurrer was, by the Court, overruled and the defendant has an exception.

The defendant, Jay Delamater, pleads "not guilty" to the offense charged in the information.

Jury called and sworn in the case of the State of South Dakota *vs.* Jay Delamater.

The State offers their testimony.

At the conclusion of the testimony the defendant moves the Court to advise the jury to return a verdict of "not guilty."

The request to advise the jury is, by the Court, denied and the defendant has an exception.

The jury were instructed by the Court.

Bailiff sworn and the jury retired.

The jury in the case of the State of South Dakota *vs.* Jay Delamater returned into court and reported that they have agreed upon a verdict.

Defendant present in person and by counsel.

The jury return the following verdict:

"We, the jury find the defendant guilty as charged in the information."

The defendant excepts to the verdict.

The Court fixed 9:30 o'clock A. M. on March 31, 1904, at the opening of Court as the time and place where the judgment of the Court would be pronounced against the defendant.

MARCH 31, 1904.

— The case of the State of South Dakota *vs.* Jay Delamater the defendant appeared in person and by counsel and filed a motion in arrest of judgment which was by the Court denied and the defendant had an exception.

48 The defendant files a motion for a new trial.

Motion for new trial argued and denied by the Court and defendant has an exception.

Defendant Jay Delamater called for sentence, and the Court sentences him to pay a fine of two hundred and fifty dollars ($250.00) and in default of payment he be imprisoned in the county jail of Potter County South Dakota for one hundred and twenty-five days (125). Defendant has an exception to the sentence and judgment.

Writ and judgment filed.

Bill of exceptions with assignment of error settled by the Court and filed.

Certificate for probable cause for writ of error signed by the Court and filed.

Order entered that "Pending the appeal in above cause defendant is allowed to go under bail fixed at the sum of $500.00 cash to be deposited with the Clerk of this Court."

Lee Stover deposits $500.00 cash with the Clerk of this Court as security as provided by above order.

I, Harry Bolinger, Clerk of the Circuit Court within and for said County of Potter in the sixth Judicial Circuit of the State of South Dakota do hereby certify and return that the foregoing is a true and correct copy of the minutes of the Journal of the March A. D. 1904 term of said Circuit Court in witness whereof I have hereunto set my hand and affixed the seal of said court at Gettysburg, South Dakota this 15 day of April A. D. 1904.

[SEAL.]

HARRY BOLINGER,
Clerk of Circuit Court,
Potter County, South Dakota.

49 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DALAMATER, Defendant.

Before Loring E. Gaffy, Presiding Judge.

Present: S. M. Howard, State's Attorney, Attorney for the Plaintiff. Lee Stover and A. J. Brower, Attorneys for Defendant. All officers of the said Court.

The following proceedings were had on March 29th, 1904:

Defendant waives reading of information and asks for copy of same, waives time to plead and enters a plea of not guilty.

The following proceedings were had on March 30th, 1904: An application made in open court leave was granted to the defendant to withdraw his plea of not guilty and to file a demurrer. Demurrer interposed to information which is overruled and an exception taken, whereupon the defendant pleaded "Not Guilty" to the offence charged in the information.

The above entitled action having been brought on for trial on this 30th day of March, 1904, at the regular 1904 adjourned term of the Circuit Court in and for Potter County, State of South Dakota, the following proceedings were had, to-wit: (Jury called and sworn to try the cause.)

JAY DELAMATER having been called and sworn in behalf of the plaintiff testifies as follows:

That the defendant Jay Delamater, is now and was on the 10th day of February, A. D. 1904, a travelling salesman employed by Lewis L. Metzger & Co., and that the said Lewis L. Metzger & Co. are residents of the City of St. Paul in the state of Minnesota
50 and that the said Lewis L. Metzger and Company have their place of business at the said City of St. Paul and have no place of business in the State of South Dakota, and have had no such place of business in the said state of South Dakota, that on the 10 day of February A. D. 1904 as such employee was engaged as said travelling salesman in soliciting said proposals or orders for said Lewis L. Metzger & Co. for the sale of intoxicating liquors in quantities less than 5 gallons from citizens and residents of and within the County of Potter and State of South Dakota who were not merchants, traders or dealers in intoxicating liquors; that on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Gross who were not merchants, traders or dealers in intoxicating liquors at and in the County of Potter and state of South Dakota soliciting or requesting proposals of orders from said last named persons for the sale to them by Lewis L. Metzger & Co. of said intoxicating liquors. That the said proposals and orders were made by said defendant, forewarded to his principal, the said Lewis L. Metzger & Co. in the city of St. Paul, state of Minnesota. At said time no money was paid by either of the said persons to the said defendant or to said Lewis L. Metzger & Co. and said proposals or orders were forewarded with the understanding that they were subject to the approval of said Lewis L. Metzger & Co. and that the defendant had no power or authority to approve said proposals or order- nor to receive any money thereon. In addition to being subject to the approval of the said Lewis L. Metzger & Co. said proposals or orders were conditioned that the said whiskey so ordered should be delivered to the said Ferdinand Renner and Paul Gross hereinbefore named f. o. b. cars at the city of St. Paul in the state of Minnesota and were to make remittance of the purchase price of said goods to said Lewis L. Metzger & Co. at the city of St. Paul in the state of Minnesota within sixty days after receipt of said liquor in said county of Potter. That this defendant has never paid any license to the County of Potter or the State of South Dakota or to the treasurer or to any one as required by Section 2834 of the Revised Code of the year
51 1903 of the state of South Dakota and that the said defendant had not then and there has never paid any license or fee whatsoever to any township, precinct town or city within the said county or state and that said liquor therein sold was intoxicating liquor, to-wit: whiskey, and was not a proprietary patent medicine and that the said defendant is not now and never has been a licensed pharmacist under the laws of the state of South Dakota.

By Mr. HOWARD:

Q. I will ask you who this party named in that statement as Jay Dalameter is?

A. Myself.

(Witness excused.)
Plaintiff rests.
Defendant rests.

Mr STOVER: At this time the defendant asks the Court to request the jury to return a verdict for the defendant upon all the issues, for the reason that it affirmatively appears from the evidence and the uncontradicted evidence of the state that no offence has been committed; that it affirmatively appears that no sale was made within the state of South Dakota and for the further reason that the statute under which the prosecution is brought is unconstitutional and void, in that it is in conflict with section 8 of article 1 of the constitution of the United States, which places in Congress the sole and exclusive right and authority to regulate and control interstate commerce. It affirmatively appears in this case from the uncontradicted testimony that this was and is a transaction involving and being interstate commerce business, being a sale made in the state of Minnesota on proposals or orders received in the State of South Dakota subject to the approval of the principal in the state of Minnesota; that the goods were to be delivered to the parties who are named as
52 purchasers in the state of Minnesota, the freight to be paid from the city of St. Paul, in the state of Minnesota by said purchasers;

That the said act under which said prosecution is drawn — unconstitutional and void, being in direct conflict with the powers of the congress of the United States and of section 8 of Article 1 of the Federal Constitution.

By the COURT: Motion is denied.

By Mr. STOVER: An exception.

Whereupon after the Court having instructed the jury and they having retired for deliberation they return into Court the following verdict: We the jury, find the defendant duly guilty as charged in the information.

By Mr. STOVER: An exception on the part of the defendant.

I hereby certify that the above and foregoing contains a full true, correct and complete transcript of my notes taken on the trial — before mentioned cause of the oral evidence educed, objections of counsel, ruling of the Court and of all proceedings save and except the instructions to the jury.

Dated this 30 day of March 1904.

W. S. LITTLE,
Official Stenographer, Sixth Judicial Circuit of the State of South Dakota.

Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota, this 31 day of March, A. D. 1904 at 9-2 A. M.

HARRY BOLINGER, *Clerk.*

53 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In the Circuit Court of the Sixth Circuit, March Term, A. D. 1904.

THE STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

I, Samuel M. Howard, the undersigned State's Attorney, in and for said county and state, in the name and by the authority of the State of South Dakota, hereby inform the court and give the court to understand, that said Jay Delamater on the 10th day of February, A. D. One Thousand Nine Hundred and Four, at and within the county of Potter and state of South Dakota, was then and there a person, whose business consisted, in whole or in part, in unlawfully selling or offering for sale spiritous, vinous, malt, brewed, fermented, or other intoxicating liquors as a traveling salesman who then and there unlawfully solicited orders for such intoxicating liquors by the jug, bottle or other vessel, in lots of less quantity than five gallons each at one time, and without having first paid the license to said county of Potter or to the Treasurer thereof as required by Sec. 2834 of the Revised Political Code of the year 1903 of the State of South Dakota; the said Jay Delamater not then and there having paid any license to any township, precinct, town or city within said county of Potter; and said liquors not being proprietory patent medicines, and the said Jay Delamater not then and there being a licensed pharmacist, agains- the form of the statute in such case made and provided, and against the peace and dignity of the state of South Dakota, and prays that the said Jay Delamater may be arrested and dealt with according to law.

SAMUEL M. HOWARD,
State's Attorney in and for the County of Potter, State of South Dakota.

Subscribed and sworn to before me on this 29 day of March A. D. 1904.

[SEAL.] HARRY BOLINGER,
Clerk of Court.

54 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

Samuel M. Howard, being first duly sworn, deposes and says: that he is the State's Attorney in and for Potter County, S. D.; that he has read the foregoing information and knows the contents thereof and that the same is true, according to his best information and belief.

SAMUEL M. HOWARD.

Subscribed and sworn to before me this 29 day of Mar. A. D. 1904.

HARRY BOLINGER,
[SEAL.] *Clerk of Court.*

Witnesses in the within entitled action, whose names are known to the State'- Attorney:—Ferdinand Renner, Paul Gross, William H. Clark.

55 [Endorsed:] Information No. —. March Term, A. D. 1904. State of South Dakota, Sixth Judicial Circuit. In the Circuit Court within and For the County of Potter. State of South Dakota *vs.* Jay Delamater. Information for selling or offering for sale intoxicating liquors in less quantities than five gallons each without a license therefor. Pres*ne*ted in open court by the State's Attorney in and for Potter County, state of South Dakota, and filed as a record of the court, this 29 day of March 1904. Harry Bolinger, Clerk. Samuel M. Howard, State's Attorney.

56 [Endorsed:] 2083. State of South Dakota, Circuit Court Potter County. State of South Dakota, Plaintiff, *vs.* Jay Delamater, Defendant. Due and personal service of the within information is hereby admitted this 29 day of March 1904. Lee Stover, A. J. Brower, Attorney- for Defendant. S. M. Howard Attorney for Plaintiff. Supreme Court. State of South Dakota. Filed Apr. 21, 1904. Frank Crane, Clerk.

[Endorsed:] Judgment Roll. Filed this April 19, 1904, at 10 A. M. Harry Bolinger, Clerk.

57–73 And afterwards, to wit: on the 7th day of May, A. D. 1904 there was filed in said case a brief of plaintiff in error which said brief is in words and figures the following, to wit:

* * * * * * *

74–86 And afterwards, to-wit: on the same day there was filed in said case an abstract of Plaintiff in Error which abstract is in words and figures following, to-wit:

* * * * * * *

87 That afterwards on the same day, the citation issued in this court on April 8th, was returned and filed in this court, which citation is in words and figures as follows, to-wit:

88 *Citation.*

STATE OF SOUTH DAKOTA:

In Supreme Court.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DALAMETER, Plaintiff in Error.

Citation.

STATE OF SOUTH DAKOTA, *ss:*

To the Attorney General and to the State's Attorney for Potter County, State of South Dakota, and said Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the State of South Dakota, to be holden at the city of Pierre in said State, at the April Term of said Supreme Court, to be holden on the twelfth day of May, A. D. 1904, at ten o'clock A. M. of that day, pursuant to Writ of Error now issued from the said Supreme Court, wherein Jay Dalamater is Plaintiff in Error, and State of South Dakota is Defendant in Error, to show cause if any there be, why the judgment of conviction of Jay Dalamater in the said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Dighton Corson, Presiding Judge of the said Supreme Court, this eighth day of April in the year of our Lord One Thousand Nine Hundred and four.

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota.
By C. LOUIS ALLEN,
Deputy Clerk.

[SEAL.]

89 [Endorsed:] State of South Dakota. In Supreme Court. State of South Dakota Defendant in Error, *vs.* Jay Delamater Plaintiff in error. Citation in State Criminal Cases. Due and person- service of the within citation by the delivery of a true copy to me at my office is admitted this 13 day of April, A. D. 1904. Philo Hall, Attorney General, State of South Dakota. S. M. Howard, State's Attorney, Potter County, South Dakota. Supreme Court, State of South Dakota. Filed May 7, 1904. Frank Crane, Clerk.

90 The case was called and ordered on the Calendar on May 12th, A. D. 1904, and placed on the Calendar on the same date.

91–150 And again on May 24th, A. D. 1904 the brief of Defendant in Error by the State's Attorney was filed, which said brief is in words and figures as follows, to-wit:

* * * * * * *

151–221 And afterwards, to-wit: on the 25th day of May, A. D. 1904 the brief of Defendant by the Attorney Gen-ral was filed, which said brief is in words and figures as follows, to-wit:

* * * * * * *

222 And afterwards on the same day the case was called on its merits and argued by counsel, and taken under advisement:

223 And afterwards on August 22nd, A. D. 1905 the following proceedings were had, to-wit:

224 File No. 2083.

In the Supreme Court, State of South Dakota, April Term, A. D. 1905.

Present: Dighton Corson, Presiding Judge, Howard G. Fuller and Dick Haney, Judges of said Court, and the officers thereof.

STATE OF SOUTH DAKOTA, Plaintiff and Defendant in Error,
vs.
JAY DELAMATER, Defendant and Plaintiff in Error.

This action coming on to be heard at the April A. D. 1904 Term of this Court, at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case, and argued by counsel and the Court having advised thereon and filed its decision in writing.

It is Considered, Ordered and Adjudged that the judgment of the Circuit Court within and for Potter County, appealed from herein, be and the same is hereby affirmed.

And it is Further Ordered that this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

By the Court,

D. CORSON,
Presiding Judge.

Attest:
FRANK CRANE, *Clerk.*
By C. LOUIS ALLEN, *Deputy.*

225 [Endorsed:] File No. 2083. In the Supreme Court State of South Dakota. April Term, 1905 State of South Dakota, Plaintiff and Def't In Error, *vs.* Jay Delamater, Defendant and Plff. in Error. Filed in open Court this 22 day of August 1905 Frank Crane, Clerk. By C. Louis Allen Deputy. Remittitur sent down —— Recorded in Judgment Book 6 Page 122

226 "H"—*a*— 2083.

In the Supreme Court, State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

Writ of Error.

Opinion. Filed August 22nd, 1905.

227 Lee Stover, for Plaintiff in Error.
Philo Hall, Attorney General, S. M. Howard, State's Attorney, and Aubrey Lawrence (of counsel), for Defendant in Error.

HANEY, *J.:*

The evidence upon which the defendant was convicted is conceded to have established the following facts: "That the defendant, Jay Delamater, is now and was on the 10th day of February, A. D., 1904, a traveling salesman employed by Lewis L. Metzger & Co., and that the said Lewis L. Metzger & Co. are residents of the city of St. Paul, in the state of Minnesota, and that the said Lewis L. Metzger & Co., have their place of business at the said city of St. Paul, and have no place of business in the state of South Dakota, and have had no such place of business in the said state of South Dakota. That on the 10th day of February, A. D., 1904, Jay Delamater, as such employe, was engaged as said traveling salesman in soliciting proposals or orders for said Lewis L. Metzger & Co. for the sale of intoxicating liquors in quantities less than five gallons, from citizens and residents of and within the county of Potter and state of South Dakota, who were not merchants, traders or dealers in intoxicating liquors; that on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Gross, who were not merchants, traders, or dealers in intoxicating liquors, at and in the county of Potter and state of South Dakota, soliciting or requesting proposals or orders from said last named persons for the sale to them by Lewis L. Metzger & Co. of said intoxicating liquors. That the said proposals and orders were procured by defendant from said named persons, forwarded to his principal, the said Lewis L. Metzger & Co., in the city of St. Paul, state of Minnesota. At said time no money was paid by either of the said persons to said defendant or to said Lewis L. Metzger &
228 Co., and said proposals or orders were forwarded with the understanding that they were subject to the approval of said Lewis L. Metzger & Co., and that the defendant had no power or authority to approve said proposals or orders, nor to receive any money thereon. In addition to being subject to the approval of said Lewis L. Metzger & Co., said proposals or orders were conditioned that the said whiskey so ordered should be delivered to the said Ferdinand Renner and Paul Gross, hereinbefore named, f. o. b. cars

at the city of St. Paul, in the state of Minnesota. That the said Ferdinand Renner and Paul Gross, hereinbefore named, were to pay the freight from the city of St. Paul, in the state of Minnesota, and were to make remittance of the purchase price of said goods to said Lewis L. Metzger & Co., at the city of St. Paul, in the state of Minnesota, within sixty days after receipt of said liquor in said county of Potter. That this defendant has never paid any license to the county of Potter or state of South Dakota, or to the treasurer, or to anyone, as required by section 2834 of the Revised Political Code of the year 1903 of the state of South Dakota, and that the said defendant had not then and there, and has never, paid any license or fee whatsoever to any township, precinct, town or city within said county or state, and that said liquor therein sold was intoxicating liquor, towit: Whisk-y, and was not a proprietary patent medicine, and that the said defendant is not now and never has been a licensed pharmacist under the laws of the state of South Dakota."

Article 6, chapter 27, of the Revised Political Code, relating to intoxicating liquors, contains the following provisions: "In all townships, precincts, towns and cities of this state there shall be annually paid the following license upon the business of selling or
229 keeping for sale by all persons whose business in whole or in part consists in selling or keeping for sale in this state distilled, brewed or malt liquors, or mixed liquors as follows: * * * Upon the business of selling or offering for sale any of the above mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, two hundred dollars per annum. Said license to be paid in each county in which said traveling salesman does business in accordance with the provisions of section 2836. * * * All persons engaged in the selling or keeping for sale of any of the liquors mentioned in this article, whether as owner or as clerk, agent, servant or employe, shall be equally liable as principals for any violation of the provisions of this article." Rev. Pol. Codes, Sec. 2834, 2852.

Defendant contends: (1) That he did not violate the law. (2) That if he did it conflicts with the interstate commerce clause of the federal constitution and is invalid.

"The Supreme court of the United States is the one ultimate judicial authority on all questions of interstate commerce. But as has been often pointed out, and even admitted by the court itself, the decisions of that high tribunal have been far from uniform, and any attempt to reconcile all that has been said and decided by it must end in confusion. The difficulty, if not impossibility, of reconciling all the decisions upon the subject is shown by the extraordinary number of dissenting opinions in the cases. Most of the important decisions were rendered by a divided court. Still it can safely be said that the differences of opinion thus manifested have not been so much upon fundamental principles as upon the applica-
tion of those principles to particular facts and the construc-
230 tion of the various state statutes which have been under consideration. The principles themselves are fairly well settled

In view of these facts the supreme court has said that it would be a useless task to undertake to fix an arbitrary rule by which the line separating the powers of the state from the exclusive power of congress in this regard must in all cases be located, and that it is better to settle each case as it arises upon a view of the particular rights involved." 17 Am. & Eng. Ency. Law, 41. It is, therefore, especially important to have the real issues presented by this appeal accurately defined. The nature of the legislation assailed is no longer open to controversy in this court. It is an exercise of the police power. It is regulation, not taxation. State *v.* Buechler, 10 S. D. 156. It does not discriminate between resident and non resident dealers. All persons whose business in whole or in part consists in selling or keeping for sale intoxicating liquors in this state are required to procure a license before engaging in such business. If the defendant violated the law it is because he was acting as the agent or employe of Metzger & Co., who were engaged within this state in the business of selling or offering for sale such liquors at retail by traveling salesman who solicited orders in lots of less than five gallons. The power of the state to impose restraints and burdens upon persons and property in conservation of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the constitution of the United States and essentially exclusive. The power of congress to regulate commerce among the several states, when the subjects of that power are national in their nature is also exclusive. The failure of Con-
231 gress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. *In re* Rahrer, 140 U. S. 545. That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power is a proposition which has never for a moment been doubted. Black Intoxicating Liquors, Sec. 31. And it is now established beyond dispute that such liquors are legitimate subjects of interstate commerce. Leisy *v.* Hardin, 135 U. S. 100; Vance *v.* Vandercook, 170 U. S., 438; *In re* Rahrer, *supra.* When the Wilson act was adopted such liquors were exempted from state regulation by operation of the interstate commerce clause to the same extent as other legitimate articles of commerce. A citizen of one state, notwithstanding the laws of another, had the right to import intoxicants into the latter and there sell them in the original packages. Up to the point of time when the importation was sold or the original package broken by the importer, the state, in the absence of congressional permission "had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer." Leisy *v.* Hardin, *supra.* The Wilson act which was adopted for the purpose of allowing state laws to operate on liquor shipped from one state into another so as to prevent the sale of original packages in violation of the state laws provides that "all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, con-

sumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, * * * and shall not be exempt there-
232 from by reason of being introduced therein in original packages or otherwise." 17 Am. & Eng. Ency. Law, 293. By that act congress "simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." *In re* Rahrer, *supra*. "Arrival within the state," as employed in that act has been construed to mean arrival of the importation at its destination, and state regulation attaches to the subject of an interstate shipment only after such shipment has been consummated by the arrival of the goods at their destination and their delivery to the consignee. Thodes *v.* State of Iowa, 18 Sup. Ct. Rep. 664. A consignee may receive for his own use regardless of state laws. Vance *v.* Bandercook, *supra*. So it would seem that these propositions have been established: (1) An importer of liquors from another state has no right to sell them in the original package or otherwise, except on the terms prescribed by the legislature of the state where the sales are made. (2) When intoxicating liquors are shipped from one state into another they do not become subject to any state police regulation on crossing the boundaries of the state into which they are shipped, but retain their character as an article of interstate commerce until delivered into the hands of the consignee; but upon such delivery they become subject to such regulations. (3) The receiver in one state of intoxicating liquor sent from another state has the constitutional right to receive it for his own use without regard to any state law to the contrary; but when received he can dispose of it in the original package or otherwise only on the terms prescribed by the state statutes. Beyond question all legitimate subjects of interstate commerce, other than
233 intoxicating liquors, may be imported and sold by the importer in the original package, and no feature of the transaction, from its inception to its consummation, is subject to a state regulation such as we are considering. "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." Robbins *v.* Taxing Dist. 120 U. S. 489. Hence, a state statute which requires that "each peddler or solicitor taking orders for groceries, clothing, hardware, or other mercantile establishments shall pay a license of not less than $75 nor more than $125 per year," in each county in which such soliciting is done, is clearly unconstitutional when applied to the case of a traveling salesman employed by a Minnesota tailor in soliciting orders for men's clothing to be manufactured in that state and shipped to individual purchasers in this. State *v.* Rankin, 11 S. D. 144. But that case and the one at bar are easily distinguishable. In that case the court was dealing with a commodity which the importer had a right to import and sell in the condition in which it was imported, notwithstanding the

state law. In this it is dealing with a commodity which the importer has a right to import notwithstanding the state law, but which he cannot sell within this state in the original package or otherwise, without conforming to the requirements of the state statute. In that case the law, by its terms, required a license for the mere soliciting of orders. In this it only requires a license of those who engage in the business of selling or offering for sale within the state. As heretofore suggested, this law, when properly construed, does not by its terms impose any restrictions upon the traffic beyond its
234 territorial boundaries or before the intoxicants have by permission of congress become subject to the police power of the state. If the St. Paul dealers were not engaged in the business of selling and offering for sale within this state they did not violate the law and cannot be heard to question its validity. If they were engaged in that business they cannot escape its consequences, because such business was state and not interstate commerce, the selling or offering for sale of intoxicants in the original package or otherwise within this state being subject to state regulation. Any enactment, the operation of which has a tendency to diminish the consumption of intoxicating liquors, may, in a sense, be said to indirectly interfere with interstate commerce in that commodity, but all such enactments are not for that reason invalid. The provision of the law here involved does not retard the consumption of intoxicants within this state and thus indirectly affect interstate commerce to any greater extent than do the provisions which require persons engaged in the business at designated places to procure permits to maintain such places. Regulation of the retail traffic when conducted by a traveling salesman is certainly not less necessary or desirable than when it is carried on by saloon keepers who are constantly subject to the observation of the general public and the inspection of city and town officers. If the latter method of making sales is to be regulated the former should be to the full extent of the state's police power. It is an universally accepted rule, frequently recognized by this court, that no legislative act should be declared unconstitutional unless the conflict between its provisions and some principle of constitutional law is so plain and palpable as to leave no reasonable doubt of its invalidity. Such a conflict certainly has not been
235 shown in the case. On the contrary the reasons for concluding that the statute, correctly construed, does not contravene the interstate commerce clause of the federal constitution are clear and convincing.

Does it appear that the defendant violated the law? The legislature did not intend to regulate the business of selling or offering for sale of intoxicating liquors in other states. A license is required only where the business is done in this state. Does it appear from the conceded facts that Metzger & Co., were engaged in the business of selling or offering to sell intoxicating liquors in this state without having procured the required license? and was the defendant acting as their employé in conducting such business. They were engaged in the business of selling and offering to sell intoxicants without a license and defendant was their employé. So much is certain. Was

the business conducted in this state or in Minnesota? Were they selling or offering to sell here or there? If here defendant violated the law. If there, he was not guilty of the crime charged. "Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property." Rev. Civ. Code, Sec. 1299. The defendant was not authorized to make sales here or elsewhere. The orders or offers obtained by him were subject to the approval of Metzger & Co. No contract was made, the minds of the parties did not meet, until the offers were received and accepted at St. Paul. It was expressly agreed that the goods should be delivered at that place. Title to the property was there transferred. Under these circumstances it seems clear that the sales took place in Minnesota and not in this state. Shuenfeldt *v.* Junkermann, 20 Fed. 357; Williams *v.* Feiniman, 14 Kan. 288; Frank *v.* Hoey, 128 Mass. 263; Kling *v.* Fries, 33 Mich. 275. If, as has been shown, persons residing in this state may purchase intoxicants in an-
236 other and receive them in this for their own use, regardless of the laws of this state, they certainly have the right to order intoxicants by mail or through the soliciting agent of a nonresident dealer. In this case the nonresident dealers appear to have merely solicited persons to purchase goods at their place of business in another state, something the legislature did not attempt to regulate, unless it be assumed that the lawmaking power intended to enact an unconstitutional statute, and of course such an assumption cannot be tolerated. So, I conclude that the law under which the defendant was convicted is valid, but that it does not appear that he violated such law. For this reason alone, I think the judgment of the circuit court should be reversed and a new trial ordered.

237 CORONS, *P. J.:*

I fully concur in the views expressed by Mr. Justice Haney as to the constitutionality of the license law of this state, but I am unable to concur in his conclusion that the defendant is not guilty of the offense charged, and that the judgment of the trial court therefore should be reversed. In my judgment when the conclusion was reached that the law is constitutional, it logically followed that the judgment of the court below was correct and should be affirmed, as the defendant was clearly doing business in violation of the law of this state without having first paid the license required by the law.

Section 2834, Rev. Pol. Code relating to the sale of intoxicating liquors provides: "In all townships, precincts towns and cities of the state, there shall be annually paid the following license * * * upon the business of selling or of-ering for sale any spirituous,vinous, malt, brewed or fermented or other intoxicating liquors at retail, * * * $400. per annum; upon the business of selling or offering for sale any of the above mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, $200. per annum." Section 2836 provides: "Every person engaged or intending to engage in any business mentioned in section 2834, and requiring the payment of any license mentioned

n such section, shall * * * pay to the county treasurer in ad-
ance the licenses required by section 2834 for such business for a
ear commencing on the 1st day of July and ending on the thirtieth
lay of June next thereafter." Section 2838 provides: "If any per-
on or persons shall engage or be engaged in any business requiring
he payment of license under section 2834, without having paid in
ull the license required by this article, * * * shall be pun-
ished by a fine of not less than $50.00 nor more than $500.
238 and costs of prosecution, or by imprisonment in the county
jail not less than ten days nor more than 30 days, or by both
uch fine and imprisonment in the discretion of the court."

It will be observed by the statement of facts in this case that the defendant was a traveling salesman employed by Lewis L. Metzger & Co. and that on the 10th day of February, 1904, he was engaged as such traveling salesman in soliciting orders for said company for the sale of intoxicating liquors in quantities less than five gallons from citizens and residents of and within the county of Potter and that he had not paid any license nor procured any permit to sell the same as required by the provisions of section 2834. The question is asked by Mr. Justice Haney in his opinion: "Does it appear that the defendant violated the law?" In my judgment that question can be answered in the affirmative. It appears from the statement of facts that the defendant was doing precisely what he was prohibited from doing without paying a license and obtaining a permit therefor. Great stress is placed upon the fact that the firm for which the defendant was soliciting orders was required to pass upon the orders and, if accepted the intoxicating liquors were delivered to a transportation company in St. Paul and that that constituted a delivery to the parties who had given the orders, outside of this state, and that for this reason the defendant had not violated any of the provisions of the law of this state. This construction of the law, it seems to me is entirely unwarranted by the language of its provisions, the evident intention of the law making power, and in conflict with decisions of the courts passing upon similar questions. When as it appears by the statement of facts the defendant was engaged in the business of offering for sale and soliciting orders
239 for intoxicating liquors without the payment of the license fee and obtaining a permit to engage in such business he was engaged in a business prohibited by the law making power. In the view I take of the case it is immaterial as to whether the transaction is to be regarded as a sale of liquor, or offering it for sale, or soliciting orders for the purchase of the same, as the doing of either act constitutes a violation of the provisions of the statute. Soliciting orders for the purchase of liquor constituted a part of the transaction in the sale of the same, and this was the view taken by the Circuit Court of the United States for the District of New Hampshire in Lang *et al. v.* Lynch, reported in 4 L. R. A. 831, in which that court held: "Orders taken for the sale and delivery of liquors in violation of the law of the state are a part of the contract of sale and as such render the entire transaction void, and no recovery thereon can be had." The learned circuit Judge in his opinion says: "I am of opinion,

therefore, that the taking of the order by the agent of the plaintiffs was a part of the contract of sale so far as to forbid a right of recovery upon the contract, and that the statute of New Hampshire inflicting a penalty for the offense prohibits the right of recovery for the price of liquors sold." It s true this was an action to recover the value of the liquors sold and delivered in another state but the court seems to take the view and I think very properly that taking an order by the agent was a part of the contract of sale. In this case it is not necessary to go so far as that court went, as our statute provides a penalty for offering for sale or for soliciting orders for the purchase of liquors.

240 The case of State *v.* Ascher, 54 Conn. 299, is directly in point as to the offering for sale or soliciting orders. In that case that learned court held that the act of the State of Connecticut of 1882 forbids all persons without a license therefor, to sell intoxicating liquors by sample or by soliciting or procuring orders and held that a contract for sale made in the state of Connecticut by a traveling agent of a firm in another state, of liquors to be delivered in such other state, is a violation of the statute. It appears in the statement of facts in that case as in this that a traveling salesman representing a firm of the city of New York was engaged in the state of Connecticut in soliciting orders for intoxicating liquors for his firm; that such orders were transmitted to the firm in New York city and if approved by the firm the liquors ordered were delivered to a carrier in New York City for the party ordering the same. The court in the case in its opinion says: "The defendant was convicted and appealed to this court. His grievance is that he was convicted of an unlawful sale, while, as he contends, he effected no sale within the meaning of the statute in this state. He says that he only solicited and obtained an order in this state, and that the sale was completed by a delivery of the liquors by his employers to the purchaser in the state of New York. The statute of 1882, part 6, section 1, (Acts of 1882, p. 185) provides that 'any person, who, without a license therefor, shall, by sample, by soliciting or procuring orders, or otherwise, sell any spiritous and intoxicating liquors, shall be fined for the first offense not more than fifty dollars, &c.' * * * The question is, what did the legislature mean by selling by sample, or by soliciting or procuring orders? A majority of the court think that it intended to prohibit just such a sale as was made in this case. If the statute is to be so construed as to limit its operation to sales completed by delivery in this state, of course a vast majority

241 of sales by soliciting orders will not be embraced in the statute. We think, that the legislature, taking notice of the fact that wholesale dealers in New York and elsewhere out of the state generally sell their wares through agents going from place to place soliciting and procuring orders, intended to prohibit such sales. Otherwise the facilities for making such sales are so great, extending to every town and hamlet in the state, that the efficiency of the license law would be materially impaired. Dealers in neighboring states, without license and without restriction could sell and cause to be delivered in any and all parts of the state, liquors to any

extent. Hence the legislature was careful to guard against such a result by prohibiting, as it does in the eleventh section, all sales without a license and all sales in a no-license town." And the court in concluding its opinion says: "The claim that the legislature intended only such sales as should be consummated by a delivery in this state cannot be allowed. It is a matter of common knowledge that sales effected by drummers are usually, if not always, consummated by a delivery at the vendor's place of business to a common carrier; and while such delivery for all civil purposes completes the sale made by the drummer, vests the title in the purchaser, and gives the seller a right to the purchase money, yet for all police purposes it is competent for the legislature to say that the acts done by the drummers shall of themselves constitute a sale and therefore an offense. And we think the legislature intended so to say, and to make all such acts an offense, whether the delivery was in or out of the state. By doing so the word 'sell' is used in the same sense in which it is generally used by business men in relation to this subject matter. In common language a drummer sells goods; he sells by sample; he sells by soliciting and procuring orders; the
242 dealers sell by drummers as their agents. Now if the statute does not reach all such cases then it falls short of reaching the evil aimed at, and the intended remedy is a failure."

That court in its opinion evidently disregarded the claim made by the defendant that the orders taken by him were required to be passed upon and accepted by the firm in New York city before a sale could be made, and the claim that the interstate commerce law was violated, as unworthy of notice as it does not refer to them in the majority opinion. It will be observed that the provisions of the statute in this state are broader and more comprehensive than the provisions of the statute of Connecticut and that they include not only the sale of intoxicating liquors but the offering for sale and soliciting of orders.

Mr. Justice Haney places reliance upon the case of Distilling Co. *v.* Nutt, 34 Kan. 724, 10 Pac. 163, but that was a civil action for the recovery of the value of a barrel of whisky delivered at Kansas City, in Missouri. In the later case of Westheimer *v.* Weisman, 60 Kan. 753, which was also an action to recover the value of certain liquor sold, the court in its opinion says: "The penalty of section 32 above quoted is inflicted upon the very person who takes or receives an order from any person in this state not authorized to sell liquor, and hence the agent receiving an order for whisky here would be amenable to the penalties of the law." And again in the same opinion the court says: "The agent made no sale and could only be liable under the statute for the taking of an order for intoxicating liquor. The statute operating only on the agent cannot prejudice the rights of Westheimer & Sons, who made the sale in another state. The agent did no more than make an offer of sale subject to the approval of his house. The final acceptance of the order and con-
243 summation of the sale occurred in Missouri, where such sales were lawful. Being lawful there, a recovery of the price of the whisky can be had in our courts." It will thus be seen that that

court recognizes the fact that while the sale of liquor may have been consummated in another state the agent who procured the order was nevertheless liable to the penalty imposed for a violation of the statute. Clearly the defendant in the case at bar was engaged in the business, in Potter county, not only of selling but offering for sale and soliciting orders for the sale of intoxicating liquors. The claim that the defendant had not committed the offense under the statute because the order had to be approved in St. Paul, and that the delivery was made there to the purchaser and not in South Dakota is clearly untenable. Such a construction is entirely unwarranted by the law itself or by the evident intention of the law making power. In my judgment it is entirely immaterial whether the liquors were delivered in this state or delivered at all; the offense was complete under the statute when the defendant solicited the order or offered the liquors for sale.

It seems to me that the construction given to our statute is altogether too narrow and technical and one entirely unwarranted either by the language of the statute or by the clear intention of the legislature in passing the act, and that the interstate commerce law is not in any manner involved in this case. The lawmaking power in adopting the license system for this state sought as far as possible to minimize the evils of intemperance and prevent the miseries resulting from the use of intoxicating liquors by requiring all parties engaged in the business, before so doing, to pay a license and obtain a permit therefor, and this policy is clearly carried out in the provisions of the statute. The legislature not only prohibited
244 the sale of intoxicating liquors but the offering for sale or the soliciting of orders for the purchase of the same by any person, unless he had paid such license and procured the permit. We may assume that the legislature knew all or nearly all traveling salesmen take orders subject to the approval of the houses represented by them and that the delivery of the goods sold is usually made in other states. If our legislature simply meant to prohibit the offering for sale or soliciting of orders in cases where the goods were actually delivered by the agent in this state, it failed to accomplish anything beneficial by the enactment of the law, as of course it was known to them as it is known to us that few if any such sales would be made by agents in this state, but there would be, as in the case at bar the form of submitting the order to the firm outside of the state and that such firm would accept the order and deliver the liquors outside of our state. I understand that the power of the legislature to require the payment of such license before engaging in the business in this state of soliciting orders or offering for sale intoxicating liquors will be affirmed by the undivided court in holding the law constitutional.

In my opinion the judgment of the court below should be affirmed.

245 FULLER, *J.*:

As self-preservation is a law of nature predominant in every organized community, the inherent right to guard against the introduction and traffic in commodities which endanger the health and

corrupt the morals of our citizens was never surrendered to the general government and the statute confessedly violated by the accused in no manner interferes with any of the laws of the United States.

From the opinion of Chief Justice Tanney in the License Cases, 5 Howard, 504, I quote as follows: "These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

Assuming that our police system of regulating the liquor traffic by means of high license has a tendency to diminish inter-
246 state shipments, that result would constitute no infringement of the Constitutional guaranty of commercial freedom among the states. Independently of any question of citizenship and without the slightest discrimination, the solicitor of orders, as a person engaged in the business of offering intoxicating liquors for sale, must pay the license or suffer the penalty provided by statute, but no penalty, restriction, or burden is imposed upon a nonresident engaged in interstate commerce.

As to the validity of the law under consideration, I concur with both my associates and, with Presiding Judge Corson, agree in the conclusion that plaintiff in error was lawfully convicted. Consequently, the determination of all questions of law and fact at the trial below are sustained by the majority of this court and the judgment of conviction is therefore affirmed.

247 STATE OF SOUTH DAKOTA, *In Supreme Court, ss:*

STATE OF SOUTH DAKOTA, Plaintiff and Defendant in Error,

vs.

JAY DELAMATER, Defendant and Plaintiff in Error.

I, Frank Crane, Clerk of the Supreme Court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from one to 21 inclusive, contain a true and correct copy of the opinion in the above entitled cause, and of the whole thereof, as the same now remains of record in said Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Pierre, this 6th day of November A. D. 1905.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE,
Clerk of the Supreme Court,
By —— ——, *Deputy.*

248 And afterwards, to-wit, on the 21st day of September A. D. 1905 a petition for a writ of error was filed and allowance made in this court, which in words and figures are as follows:

249 Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

Upon presentation and consideration of the petition of the plaintiff in error herein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States, the questions presented by the record in said matter,

It is hereby ordered, that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States. It is further ordered that security in this matter be fixed in the sum of One Thousand ($1000) Dollars, and that upon filing approved security in that amount, with the writ of error herein, all proceedings herein be stayed pending the final determination of said matter by the Supreme Court of the United States.

Dated this 18th day of September, 1905.

DIGHTON CORSON,
Presiding Justice, Supreme Court of the State of South Dakota.

250 STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

To the Honorable Dighton Corson, presiding judge of the Supreme Court of the State of South Dakata:

Now comes, Jay Delamater, the above named plaintiff in error by his attorneys, M. H. Boutelle and Jonas Weil, and complains and alleges that he is a citizen of the United States of America; that in the above entitled matter, on the 22nd day of August, 1905, final judgment was rendered against your petitioner by the Supreme Court of the State of South Dakota, that being the highest court of law or equity in the said State of South Dakota, wherein, it was adjudged that the provisions of Article 6, Chapter 27, of the Revised Political Code of the State of South Dakota and more particularly, Sections 2834 and 2852 of said Revised Political Code of said State, which made it unlawful for any traveling salesman to solicit orders within said State of South Dakota for distilled, brewed or malt liquors or mixed liquors in lots of less than five gallons, without first obtaining the license thereby provided, and further made the solicitation of orders for such liquors without obtaining such license, a criminal offense, punishable in accordance with the provisions of that

Act, are not in conflict with the provisions of Section 1, of the Fourteenth Amendment to the Federal Constitution, in that the provisions of said Act did not deprive certain citizens of the United States of the right, privilege or immunity secured to other citizens of the United States, nor of the equal protection of the law,
251 and wherein, it was also adjudged by said Supreme Court by its said final judgment in the above entitled matter, that the provisions of said Act of the State of South Dakata are not in violation of the provisions of Section 8, of Article I, of the Federal Constitution, giving to Congress the exclusive right to regulate commerce among the several States, all of which appears in the record, opinion and final judgment of said Supreme Court, affirming the judgment of conviction theretofore rendered in the Circuit Court of said State, whereby manifest error has happened to the great damage of your petitioner.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota and the Judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States and the error complained of by your petitioner may be examined and corrected and said judgment reversed, and your petitioner will ever pray.

JAY DELAMATER,

By —— ——,

His Attorneys.

252 Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,

vs.

JAY DELAMATER, Plaintiff in Error.

Now comes, the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of South Dakota in the above entitled matter, there is manifest error in this, to-wit:

First: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, are not in conflict with and in violation of, Section 8, of Article I, of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several States.

Second: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of

citizens of other States of the United States than the State of
253 South Dakota, and having no residence or place of business in said State of South Dakota, do not constitute regulations and restrictions on commerce between the several States.

Third: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, do not constitute a tax upon commerce between the several States.

Fourth: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, was within the police powers of the Legislature of the State of South Dakota.

Fifth: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, making it unlawful for the plaintiff in error to carry on his business as a traveling salesman of and for a citizen or citizens of other States than the State of South Dakota and having and maintaining no office or place of business within said State of
South Dakota, without taking out a license from said State
254 and paying the license fee provided by said laws, was within the police powers of the Legislature of the State of South Dakota.

Sixth: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, was not in conflict with and in violation of, the provisions of the Fourteenth Amendment of the Constitution of the United States, for that the State of South Dakota by and through the provisions of said laws, assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States and of the State of South Dakota, of rights, privileges and immunities secured to other citizens of the United States and of the said State,

and (2) to deprive and to deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of South Dakota, the equal protection of the law.

Seventh: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, are not in conflict with and in violation of, the provisions of Section 2, of Article 4, of the Constitution of the United States.

Eighth: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or
255 purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, do not discriminate between citizens of South Dakota and citizens of other States.

Ninth: The Court erred in affirming the judgment of conviction.

Tenth: The Court erred in failing to render judgment that the laws on which plaintiff in error was convicted, were illegal as contrary to the Constitution of the United States, and that the judgment of conviction should be reversed.

——— ———,
——— ———,
Attorneys for Plaintiff in Error.

256 Filed in my office this 21st day of September, 1905.

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota.

257 [Endorsed:] 2083. Supreme Court of the State of South Dakota. State of South Dakota, Defendant in error — Jay Delamater, Plaintiff in error Petition and allowance of writ of error and assignment of error. M. H. Bartelly and Jonas Weil, Att'y for P'tf in error Supreme Court, State of South Dakota Filed Sep. 21 1905 Frank Crane, Clerk.

258 And afterwards, to-wit: on the same day there was filed in this court a writ of error from the United States Supreme Court which said original writ appears on the next page:

259 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Dakota, Greeting

Because in the record and proceedings as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of South Dakota before you, or some of you, by the highest court of law or equity of said State in which a decision could be had in the said suit between State of South Dakota, defendant in error and Jay Delamater, plaintiff in error, wherein was drawn in question the validity of a Treaty or Statute of or an authority exercised under the United States and the decision was against their validity or wherein was drawn in question the validity of a Statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, Treaties or Laws of the United States and the decision was in favor of such, their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a Treaty, or Statute of or Commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, Treaty or Commission, a manifest error hath happened to the great damage of the said Jay Delamater, as by his complaint appears, we being willing that error, if any hath been, should be corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 10th day of November 1905, in the said Supreme Court, to be then and there held that, the record and proceedings aforesaid being inspected, the said Su-

260 preme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 19th day of September, in the year of our Lord, Nineteen Hundred and Five.

[Seal Circuit Court of the United States, District of South Dakota. Sioux Falls.]

OLIVER J. PENDAR,
Clerk United States Circuit Court, in and for the District of South Dakota.

261 [Endorsed:] 2083 Supreme Court of the State of South Dakota. State of South Dakota, Defendant in Error, *vs.* Jay Delamater, Plaintiff in Error. Writ of Error. Original received and copy lodged in this office this 21 day of September, 1905 Frank Crane Clerk Supreme Court, State of South Dakota. M. H. Boutelle and Jonas Weil Att'ys for P'l'f in Error Supreme Court State of South Dakota. Filed Sep. 21 1905 Frank Crane Clerk

262 That afterwards, to-wit, on the same day there was filed in this court a citation on Writ of Error which in words and figures is as follows, to-wit:

263 Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

UNITED STATES OF AMERICA, *ss:*

To the State of South Dakota, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of South Dakota, wherein, Jay Delamater is plaintiff in error and you, the State of South Dakota, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Dighton Corson, presiding Justice of the Supreme Court of the State of South Dakota, this 21st day of September, in the Year of our Lord, One Thousand Nine Hundred and Five.

DIGHTON CORSON,
Presiding Justice of the Supreme Court of the State of South Dakota.

264 Copy of the within citation received this — day of September, 1905, at the office of the Attorney General of the State of South Dakota.

——— ———,
Attorney General.

265 [Endorsed:] 2083. Supreme Court of the State of South Dakota State of South Dakota, Defendant in Error, *vs.* Jay Delam-ter, Plaintiff in Error. Citation on Writ of Error Supreme Court State of South Dakota Filed Sep. 21 1905 Frank Crane, Clerk. M. H. Boutelly, and Jonas Weil, att'ys for P't'f In Error.

266 That afterwards, to-wit, on the same day there was filed in this court an Undertaking on Writ of Error which original undertaking appears on the next page.

267 Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

Undertaking on Writ of Error.

Know all men by these presents, that the United States Fidelity and Guaranty Company of Baltimore, a corporation organized under the laws of the State of Maryland, has and hereby does undertake, promise and agree to pay unto the State of South Dakota, its successors or assigns, the sum of One Thousand ($1000) Dollars.

The condition of this undertaking is such that whereas, the above named Jay Delamater, plaintiff in error in the above entitled action in which judgment has heretofore been rendered in the Supreme Court of the State of South Dakota, has prosecuted a writ of error in the Supreme Court of the United States to review and reverse the said judgment of the Supreme Court of the State of South Dakota.

Now therefore, the condition of this undertaking is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this undertaking shall be void, otherwise, to remain in full force and effect.

[Seal The United States Fidelity & Guaranty Company. Incorporated 1896.]

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By DOUGLAS W. MARCH.
H. R. HORNER.

268 STATE OF SOUTH DAKOTA, — *County:*

On this — day of September, A. D., 1905, personally appeared before me —— ——, who being duly sworn, deposes and says that he is a member of the local Board of Directors of the United States Fidelity and Guaranty Company of Baltimore; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and the said —— —— acknowledged said instrument to be the free act and deed of said corporation.

—— ——,
Notary Public, — County, South Dakota.

The within undertaking is hereby approved, this 23rd day of September, 1905.

DIGHTON CORSON,
Presiding Justice of the Supreme Court of the State of South Dakota.

9 [Endorsed:] 2083. Supreme Court of the State of South Dakota. State of South Dakota, Defendant in Error, *vs.* y Delamater, Plaintiff in Error. Undertaking on Writ of Error. upreme Court, State of South Dakota. Filed Sep. 21 1905 Frank rane, Clerk. M. H. Bautelle & Jonas Weil, Att'y for P'l'f in Error.

70 In the Supreme Court, State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

I, Frank Crane, Clerk of the Supreme Court of the State of South Dakota, certify that the within and foregoing is a correct and complete transcript of the record and proceedings of the above entitled cause as the same now appears of record and on file in this court.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE,
Clerk of the Supreme Court, State of South Dakota.

271 Supreme Court of the United States, October Term 1906.

No. 149.

JAY DELAMETER, Plaintiff in Error,
v.
STATE OF SOUTH DAKOTA, Defendant in Error.

It is agreed by and between Counsel for Plaintiff in Error and Counsel for Defendant in Error, that there may be omitted from the printed record to be used in the above styled cause in the Supreme Court of the United States all briefs that were used in the lower courts, and all briefs which are incorporated in the record as filed in this Court, and that neither party to this agreement shall be prejudiced in any manner by the omission of such briefs as part of the printed record.

HERBERT JACKSON,
Counsel for Plaintiff in Error.
S. M. HOWARD,
Counsel for Defendant in Error.

272 [Endorsed:] File No. 19963. Supreme Court U. S. October Term, 1906. Term No. 149. Jay Delamater, P'l'ff in Error, *vs.* The State of South Dakota. Stipulation to omit parts of record in printing Filed June 30, 1906.

Endorsed on cover: File No. 19,963. South Dakota supreme court. Term No. 149. Jay Delamater, plaintiff in error, *vs.* The State of South Dakota. Filed November 13th, 1905. File No. 19,963.